Filed 3/12/09 Marriage of Wha and Kim CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re Marriage of JEONG WHA and YOUNG PAL KIM.	B204886 (Los Angeles County Super. Ct. No. LD 034818)
JEONG WHA KIM, Appellant, v. YOUNG PAL KIM, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Wendy L. Kohn, Judge. Reversed.

Law Offices of Fred E. Schulcz and Fred E. Schulcz for Appellant.

Merritt L. McKeon for Respondent.

Jeong Wha Kim (Mrs. Kim) appeals the trial court's dismissal of her petition for marital dissolution for failure to bring the matter to trial within five years of commencing the action pursuant to Code of Civil Procedure section 583.310. Mrs. Kim contends the statute was tolled under certain statutory provisions because: (1) the trial court reserved jurisdiction over the spousal support issue; (2) the trial court conducted a "partial" trial; and (3) the marital status issue was bifurcated from the rest of the action through a marital dissolution adjudication in Korea. In addition, Mrs. Kim contends that continued prosecution of the family law case after the five-year period expired acted as a waiver or estoppel of dismissal. We conclude that the trial had commenced for purposes of Code of Civil Procedure section 583.310 and therefore reverse.[1]

RELEVANT BACKGROUND

Jeong Wha Kim and Young Pal Kim (Mr. Kim) were married for 21 years when they separated. Mrs. Kim filed a petition for dissolution on June 8, 2001, which she amended in January 2002. Among other things, she requested dissolution of the marriage, spousal support, and a determination of property rights. In his response, Mr. Kim similarly sought a dissolution of the marriage, spousal support, and a determination of property rights.

In July 2002, Mrs. Kim filed an application for an order to show cause for child and spousal support and for attorney fees and costs. The hearing was initially set for August 1, 2002. Mr. Kim filed a responsive declaration opposing Mrs. Kim's requests for child support, spousal support, and attorney fees and costs. He requested that the family residence be sold.

The order to show cause was heard in October 2002. At the hearing, the court permitted Mr. Kim to call his Korean attorney, Geon Haeng Lee, as a witness. Mr. Lee

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[1] Due to our conclusion that reversal is required, we do not address Mrs. Kim's remaining contentions.

was duly sworn and testified that he represented Mr. Kim in a divorce proceeding filed by Mrs. Kim in Korea. Mr. Lee testified that both Mr. and Mrs. Kim agreed to the dissolution. Mrs. Kim obtained an award of approximately $25,000, which Mr. Kim had appealed. Mr. Lee agreed with counsel that the award did not constitute either a division of assets or alimony (which Mr. Lee stated was not recognized in Korea).[2] The case still pending in Korea did not, Mr. Lee affirmed, pertain to division of any property Mr. Kim's parents may have had in Korea. Regarding the "statement of opinion" Mr. Lee apparently provided, he stated that under Korean law, when both parties to a dissolution are Korean nationals, "Korea prescribes that the priority is under the Korean law, it has, the jurisdiction is in Korea."

On cross-examination, Mr. Lee indicated he was unaware that Mrs. Kim was a United States citizen. He further stated there were no issues with respect to any real property owned by the Kims currently pending in Korean courts. The court asked whether the parties were "formally divorced." Mr. Lee testified they were not because the case was still on appeal. He confirmed that the order Mr. Kim appealed had found him responsible for the breakup of the marriage.

The court directed the parties to serve and file additional points and authorities on whether the court had jurisdiction to proceed on the issue of alimony or other divorce-related issues, or "whether the Korean case takes precedence as res judicata." The court stated the parties had stipulated that the family residence had been sold and the proceeds were in escrow. The court continued the matter to March 2003.

On December 6, 2002, the Kims stipulated that each could receive $10,000 from the escrow blocked account.

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[2] Mr. Lee agreed the $25,000 award was "for emotional distress caused by Mr. Kim in the marriage."

The parties submitted their points and authorities[3] regarding the court's jurisdiction over the dissolution of their marriage in March 2003. They also stipulated that any spousal support order the court might make in connection with the hearing on the order to show cause would be "made retroactive to the original date of service of the initial Order to Show Cause on 3/3/02 or the date of the next hearing [*sic*]."

By minute order on March 12, 2003, the court continued the matter to July 14, 2003.

In July 2003, the parties stipulated to continue the matter to November 18, 2003, which was reflected in the minute order dated July 14, 2003.

By minute order dated November 18, 2003, the court continued the matter to April 6, 2004 and directed petitioner to give notice. Notice was served on November 19, 2003.

On March 5, 2004, the parties filed their stipulation and order regarding the partial release of funds from escrow. The parties were each to receive $10,000.

On April 6, 2004, on motion of counsel, the court ordered the family law action consolidated with a civil case in which Mrs. Kim's sister (Ms. Park) sued Mr. and Mrs. Kim for repayment of a loan (which implicated proceeds from the sale of community property) (hereafter, the civil law action). The family law case was designated the lead case. The court set the matter for hearing on July 29, 2004.

On July 15, 2004, Mrs. Kim's counsel gave notice that the *status* conference scheduled for July 29, 2004 had been continued to October 13, 2004. The court's minutes for July 29, 2004 reflect that the matter was called for hearing, and there were no appearances. The matter was ordered off calendar.

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3 The copy of Mr. Kim's brief contained in the appellant's appendix does not bear a "filed" stamp, however, the proof of service indicates the document was served on March 7, 2003.

The court's minutes of October 13, 2004 reflect that the matter was called for hearing, that there were no appearances, and that the matter was ordered off calendar. The parties subsequently stipulated and the court ordered that the order to show cause and the status conference set for October 13 would be continued to January 20, 2005.

On January 20, 2005, the court ordered the matters continued to July 20, 2005 and directed petitioner to give notice, which was given.

By stipulation and order filed on February 3, 2005, Mr. and Mrs. Kim each received $15,000 from the escrow account. In addition, the sum of $5,000 was to be paid to their son, Gilbert, for medical treatment, each party to be charged with half the amount.

By stipulation and order filed on March 18, 2005, the funds remaining in the escrow account ($104,249.01) were forwarded to and deposited in Mrs. Kim's attorney's client trust account, and the escrow account was closed.

On July 20, 2005, the court conducted the status conference. The trial setting conference was set for September 28, 2005. Although the minute order refers to other orders "as recited in open court and as fully reflected in the official notes of the court reporter," the transcript states: "Chambers conference held and all other matters related to this case *not* reported."

On August 3, 2005, the court, on its own motion, set a status conference on jurisdiction for August 30, 2005.[4]

At the hearing on August 30, 2005, the court observed that the facts in the case had changed and that the court needed updated briefing on the jurisdictional issue. Noting that, given the Korean divorce, the court might not have jurisdiction over the marriage any longer, the court explained the uncertainties the case presented: "Now the question is, we have a judgment and we don't know what the judgment says. There's

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[4] The minute order is dated August 30, but that appears to be a typographical error because the clerk's certificate of mailing/notice of entry of order is dated August 3, 2005.

also, in the file, if I recall, a letter. I don't know how that is in the file, if it came in as a piece of evidence . . . , but there is a letter from a Korean attorney. [¶] One of the things that caught my eye in the letter is it says that when the petitioner went to obtain her divorce in Korea, she asked for the divorce and for, quote, "the alimony," unquote. [¶] [W]hat subsequently happened when she asked for the "alimony[,]" I don't know. That may affect the jurisdiction in this matter, so I think we need to have that briefed. [¶] The other questions is: What do you want to do about — we're going to have to have some testimony because the only way it comes in as to what that judgment in Korea is [is] through expert testimony on Korean law. [¶] So I don't know if we need to do that before I make the jurisdictional determination. I would think I might have to before we can make the jurisdictional determination. [¶] So that's where I'm at. I don't know how to proceed. These are the issues. And we have to decide the logical and most cost effective way to proceed with this. . . ."

After further discussion, the parties indicated that they wanted to speak to a particular Korean law expert before seeking an order that they pursue alternative dispute resolution (ADR). The court noted that the case was scheduled for another hearing on September 28, 2005 and that, in any event, the claimant in the civil case (Mrs. Kim's sister) was not present, so the court was unable to make any orders potentially affecting her without her input. The court directed Mrs. Kim's counsel to contact claimant's counsel to explain what occurred at the hearing and to inform the claimant that "[n]o decisions were made."

On September 28, 2005, all parties appeared by counsel. The court referred the case to mediation through the ADR office and set a status conference for January 23, 2006. Mrs. Kim's counsel asked for a "back up date" for trial in the event the case did not settle, but the court refused, saying: "You're not getting a trial date till you're ready to go to trial. . . . [¶] Nobody can tell me, No. 1, that even with respect to the property that they have anybody who can testify competently as to who holds title. . . . [I]t's ridiculous, I would think, to . . . go through a whole trial, on all the issues and then have one of the issues be[:] do we even have jurisdiction[?] [¶] . . . We're going to have to

get a better plan before I can give you a trial date, because — and then how long do you think we have to have — prove the title. We have to prove the jurisdiction. We have to prove the date of separation. We have to prove what was litigated. We have to prove the meaning of the judgment, including if they have retained any jurisdiction. Then we have to prove the liability on this one debt." The court referred the matter for mediation and set a postmediation conference for January 23, 2006.

At the hearing on January 23, 2006, Mr. Kim's attorney explained that they had been unable to hold the mediation because Mr. Kim was in Korea and would not be present until "sometime in like April." The court continued the status hearing to May 22, 2006, but cautioned, "I don't know if we're going to be ready to go because I'm not sure exactly everything I need to rule on, what's really pending."

On May 22, 2006, Mr. Kim's counsel reported that they had gone to mediation but had not been able to settle the case. The court continued the status conference to August 22, 2006, noting that the jurisdictional issue was still pending. The court asked when the Kims' divorce was effective; Mr. Kim's counsel responded that she believed it was in March 2003.

Mr. Kim's counsel sought a continuance of the August 22, 2006 hearing, which was denominated in the minute order as a trial setting conference. The conference was continued to December 6, 2006, and the minute order indicated there were to be "no further continuances of this Trial Setting Conference." Counsel's notice of the continuance referred to the conference as a status conference and did not include the prohibition on further continuances.

Mr. Kim's counsel sought another continuance of the "Status Conference/Return from Mediation" set for December 6, which the court scheduled for February 22, 2007.

The minute order for February 22, 2007 states that Mrs. Kim sought a continuance, which the court set for May 23, 2007.

At the hearing on May 23, 2007, the court stated that the "statute of limitations"[5] on the case had run: "Without the consent of all the parties, the case is going to be dismissed. There was never child support orders [*sic*] and since there was no bifurcation, it's . . . mandatory without the consent of the parties." The court gave the parties an opportunity to submit briefs and continued the matter until September 5, 2007. The court notified the parties by minute order dated June 22, 2007 that they should be "prepared to argue why [the civil case], which is post-judgment, and which was consolidated with [the family law case], should not be severed, no matter what the outcome is regarding the statute of limitations issue."

In her brief, Mrs. Kim argued the case was not subject to mandatory dismissal for several reasons. First, Code of Civil Procedure section 583.161 excepted from dismissals under Code of Civil Procedure section 583.360 any family law case in which an order of support had been issued. As a reservation of jurisdiction to make a support order constituted a support order for purposes of this section, the trial court's continuances of the order to show cause re: support throughout the pendency of the case effectively and impliedly reserved the court's jurisdiction to enter a support order.

Second, the parties' marriage was dissolved in Korea, and the court needed to resolve only the issues of support and distribution of community property. The Korean case constituted a separate trial on the issue of marital status pursuant to Family Code section 2337, and the instant action could not be dismissed for delay in bringing the remaining issues to trial, per Code of Civil Procedure section 583.161, subdivision (c).

Third, a "partial" trial occurred on October 28, 2002, when the court received evidence in the form of sworn testimony from Mr. Kim's Korean counsel, Mr. Lee. As a

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[5] In referring to the "statute of limitations," the trial court plainly meant the requirement that an action be brought to trial within five years of its commencement. (Code Civ. Proc., § 583.310.)

result, the action could not be dismissed, regardless of how long it took to try the remaining issues in the case.

Fourth, she argued the order to show cause was still pending, and the court should hear the matter before it considered dismissing the case under Code of Civil Procedure section 583.360. Finally, considerations of equity and fairness dictated that the court not dismiss the case.

In response, Mr. Kim argued first that the Korean case did not constitute a bar to mandatory dismissal because: (1) the Korean court did not adjudicate the marital dissolution "pursuant to Family Code section 2337," as that statute requires; (2) the Korean adjudication did not result from the bifurcation of the California case, as set forth under Code of Civil Procedure section 1048, subdivision (b) and did not preclude mandatory dismissal under the five-year statute; (3) the Korean action did not relieve Mrs. Kim of the obligation to bring her remaining claims to trial within the five-year statute; and (4) the Korean court's adjudication did not satisfy Mrs. Kim's obligation to bring the instant case to "trial" within the meaning of Code of Civil Procedure section 583.310.

Second, Mr. Kim argued the tolling provisions of Code of Civil Procedure section 583.340 did not apply here because the court's jurisdiction was never suspended, stayed, or enjoined. Further, Mrs. Kim failed to show that it was impossible, impracticable, or futile to bring her case to trial within the five-year limit.

The plaintiff in the consolidated civil action, Ms. Park, argued that the action was not subject to mandatory dismissal because: (1) certain circumstances tolled application of the statute; (2) the parties exercised reasonable diligence in prosecuting the case; (3) a trial within the meaning of Family Code section 2337 had occurred with respect to the parties' marital status; and (4) dismissal would preclude Ms. Park from recovering on her judgment against Mr. and Mrs. Kim's community property.

At the hearing on September 5, 2007, the court found: (1) it had not expressly reserved jurisdiction; (2) it had not severed the issue of the dissolution of the marriage for early trial; (3) there was no indication the case ever went to trial; and (4) there was no

waiver of the statute of limitations. The court ordered the funds from the sale of the family residence held in Mrs. Kim's counsel's trust account to be released to Mr. and Mrs. Kim equally. The court found the "5-year statute of limitation" had run and dismissed the action. The court severed the consolidated family and civil cases and transferred the civil action back to the appropriate court for reassignment.

Mrs. Kim filed a motion for reconsideration pursuant to Code of Civil Procedure section 1008 on the grounds that the court failed to consider that: (1) by suspending the order to show cause hearing on October 28, 2002 for further briefing after receiving partial testimony, it "implied that it was reserving jurisdiction to make further spousal support orders, thereby suspending the operation of the dismissal statute"; (2) after it received the parties' briefs, the court made no findings that it did not have jurisdiction to make support orders, and, together with the fact that Mrs. Kim never took her order to show cause off calendar, this constituted the court's implied reservation of jurisdiction to make spousal support orders; (3) the preference for express reservations of jurisdiction did not preclude an implied reservation of jurisdiction to make a support order; and (4) in the case of a lengthy marriage, implied reservation of jurisdiction over spousal support "now follows automatically" under Family Code section 4336, subdivision (a). Ms. Park joined in the motion; Mr. Kim opposed it.

The court denied the motion on October 18, 2007.

On November 8, 2007, the court issued the order of dismissal and made the following findings:[6]

"1. This matter was filed on January 17, 2002.[7]

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[6] The findings are as corrected nunc pro tunc by minute order dated December 14, 2007.

[7] This appears to be a clerical error. The record shows the petition was filed on June 8, 2001.

"2. The parties were referred to Court-sponsored mediation on September 28, 2005 upon the suggestion of the Court and their agreement to avail themselves of this program.

"3. A status conference was held on May 22, 2006 and was continued to August 22, 2006. That hearing was continued by the parties without an appearance to December 6, 2006; the minute order reflects that there were to be no further continuances. There is nothing in the Court file to indicate that notice was given of the Court's intent to have no further telephonic continuances. Again the parties continued the hearing without a court appearance to February 22, 2007, and then again to May 23, 2007. At the May 23, 2007 hearing, the court informed the parties that the statu[t]e of limitations had run.

"4. No order was made by the Court reserving jurisdiction over the issue of spousal support, expressly or otherwise.

"5. No bifurcation and separate trial on the issue of status was conducted pursuant to *Family Code* [*s*]*ection 2337*, which would have precluded a dismissal pursuant to *Code of Civil Procedure*[*s*]*ection 583.310*.

"6. The taking of sworn testimony in connection with an Order to Show Cause filed *pendent*[*e*] *lite* did not constitute a partial trial.

"7. The parties did not extend the time within which this matter could be brought to trial.

"8. It was not impossible, impracticable, or futile to bring this matter to trial within the statutory time.

"9. There was no proof that the mandatory dismissal statute had been tolled.

"10. This matter was not brought to trial within five years after the action was commenced against the defendant, and the case needs to be dismissed."

The court ordered the consolidated family law and civil actions severed and returned the civil case to the civil law department, dismissed the family law action pursuant to Code of Civil Procedure section 583.310, directed release of the remaining funds from the sale

of the family residence held in Mrs. Kim's counsel's trust account, and vacated any prior order preventing a levy on the funds maintained in Mr. Kim's counsel's trust account.

Mrs. Kim filed a timely notice of appeal.

STANDARD OF REVIEW AND APPLICABLE LAW

"In reviewing the lower court's dismissal of [an] action for failure to prosecute, the burden is on appellant to establish an abuse of discretion. [Citation.] We will not substitute our opinion for that of the trial court unless a clear case of abuse is shown and unless there is a miscarriage of justice. [Citation.]" (*Mitchell v. Frank R. Howard Memorial Hospital* (1992) 6 Cal.App.4th 1396, 1402.)

Code of Civil Procedure section 583.310 requires an action "to be brought to trial within five years after the action is commenced against the defendant." Section 583.360, subdivision (a) provides: "An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article." The statute serves to "prevent[] prosecution of stale claims where defendants could be prejudiced by loss of evidence and diminished memories of witnesses [and] to protect defendants from the annoyance of having unmeritorious claims against them unresolved for unreasonable periods of time. [Citations.]" (*Lewis v. Superior Court* (1985) 175 Cal.App.3d 366, 375.)

Where, however, an order for child or spousal support has been issued in connection with the proceeding, and the court has not terminated it, or where the petition is "for dissolution of the marriage and a separate trial on the issue of the status of the marriage has been conducted pursuant to [s]ection 2337 of the Family Code[,]" a marriage dissolution petition cannot be dismissed under the five-year dismissal statute. (Code Civ. Proc., § 583.161, subds. (a)-(c); Weil & Brown, Cal. Practice Guide: Civil

Procedure Before Trial (The Rutter Group 2008) ¶ 11:46.1, p. 11-33.)[8] Conducting a bifurcated "status only" trial operates not just to toll the five-year period but as a bar to dismissal for delay in bringing the remaining issues to trial. (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 15:24, p. 15-10; Code Civ. Proc., § 583.161, subd. (c).) A judgment need not be entered in that "status only" trial: the dismissal bar is "triggered so long as a 'separate trial' on the status issue 'has been conducted' pursuant to [Family Code section 2337]." (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, at ¶ 15:24.1, p. 15-10.)

The five-year period begins to run when the action is "commenced against the defendant" and continues until the action is "brought to trial." (Code Civ. Proc., § 583.310.) "'Commencement' of an action for purposes of section 583.310 and its predecessor, former section 583, is firmly established as the date of filing of the initial complaint. [Citation.]" (*Brumley v. FDCC California, Inc.* (2007) 156 Cal.App.4th 312, 318.) In a nonjury trial, such as here, an action is "brought to trial" for purposes of the five-year statute when the first witness is sworn. (*Hartman v. Santamarina* (1982) 30 Cal.3d 762, 765.)

The five-year period can be extended by written stipulation or oral agreement made in open court among the parties. (Code Civ. Proc., § 583.330.) In addition, certain events toll the five-year statute. Notably, when the court's jurisdiction to try the action has been suspended, when prosecution of trial of the action has been stayed or enjoined, and when, for any other reason, bringing the action to trial is "impossible, impracticable, or futile," the five-year statute is tolled. (Code Civ. Proc., § 583.340.) The five-year statute is also tolled when a case is ordered to mediation during the last six months of the five-year period or was ordered to mediation earlier and remains in mediation during any

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8 Once the support orders expire, litigants have at least six months within which to bring all remaining issues to trial. (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶¶ 15:23, 15:23.1, p. 15-8.)

part of the last six months. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 11:202.20, p. 11-75, citing Code Civ. Proc., §§ 1775, 1775.7, subd. (b).) It is plaintiff's duty "'to exercise reasonable diligence to insure that a case is brought to trial or other conclusion within statutory time constraints. [Citations.]'" (*Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1270.)[9]

DISCUSSION

Since 1923, California courts have deemed nonjury trials to have been "brought to trial" under the five-year statute when the first witness is sworn in a trial proceeding. (*Miller & Lux, Inc. v. Superior Court* (1923) 192 Cal. 333, 342; *Hartman v. Santamarina*, *supra*, 30 Cal.3d at p. 765.) This practice applies to dissolution actions. (*In re Marriage of Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 254-255.) A frequently quoted definition of a "trial" is "the examination before a competent tribunal, according to the law of the land, of questions of fact or of law put in issue by pleadings, for the purpose of determining the rights of the parties." (*Adams v. Superior Court* (1959) 52 Cal.2d 867, 870.)

The original petition in this case was filed on June 8, 2001. Under the five-year statute, Mrs. Kim had until June 8, 2006 to bring her action to trial.[10] In October 2002, during the hearing on Mrs. Kim's order to show cause re child and spousal support,

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[9] "This rule is well founded: the burden of keeping track of the relevant dates should properly fall on plaintiffs, because it is they who have the interest, and the statutory duty under section 583.310, to timely prosecute their cases." (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 434.)

[10] Mediation can have the effect of extending the five-year period, depending on when the court orders the parties to mediation and the date of the unsuccessful mediation. (Code Civ. Proc., §§ 1775, 1775.7, subd. (b), 1775.9; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 11:202.20, p. 11-75.) As Mrs. Kim does not contend her case should not have been dismissed for this reason, we do not consider the potential impact of these statutory provisions on this case.

Mr. Kim was allowed to call the attorney who was representing him in the parallel dissolution proceeding Mrs. Kim had brought in Korea. Mr. Kim explained Mr. Lee would testify to facts relating to the issue of whether Mr. Kim's parents made a gift of property to him and Mrs. Kim. Mr. Lee was sworn as a witness, and his testimony was relevant to issues of separate and community property raised in the case. The case was "brought to trial" for purposes of the five-year statute within sixteen months. The trial court thus erred in dismissing this action under Code of Civil Procedure section 583.310, and we reverse accordingly.

DISPOSITION

The judgment of dismissal is reversed.

Appellant is awarded her costs on appeal.

NOT TO BE PUBLISHED

WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

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*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.